

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN W. CLEM**

Claimant

VS.

**ATCHISON CASTING CORPORATION**

Respondent

Self-Insured

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Docket No. 216,056

**ORDER**

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated March 19, 1999, wherein claimant was granted medical treatment with Dr. Norman W. Thoms for an injury to his left shoulder and upper extremity.

**ISSUES**

- (1) Did claimant meet with personal injury by accident arising out of and in the course of his employment through his last day worked with respondent on approximately May 7 or 8, 1996?
- (2) Did claimant provide respondent with timely notice of personal injury by accident arising out of and in the course of his employment?
- (3) Is claimant's current condition, for which medical treatment has been ordered, causally related to his work activities with respondent?
- (4) Did claimant's condition, for which medical treatment has been ordered, constitute a preexisting condition and, if so, was it permanently aggravated by his work activities with respondent?
- (5) Did claimant's work activities, subsequent to his employment with respondent, aggravate his condition so as to constitute an intervening accident?

- (6) Was claimant's preexisting condition aggravated by claimant's activities of daily living outside of his work responsibilities with respondent?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant alleges accidental injury to his left upper extremity and shoulder on or about May 7 or 8, 1996, while performing the job of riser burn cutter, which required claimant to use a hand-held torch, a high cycle grinder and an arc air. The use of the hand-held torch, as described by both claimant and respondent's representative, David Blakley, required the use of both hands. Claimant would perform the cutting job with this torch approximately six hours per day. The use of the torch did require that claimant use his right hand to hold the trigger and his left hand to support the approximately 3-foot long cutting wand. The pressure created by the torch is described as being approximately that of a hand-held, car wash spray wand. Claimant performed approximately 20 percent of his duties while reaching overhead.

Claimant acknowledged having similar symptoms in 1991 while in the military in Germany during Desert Storm. At that time, claimant's hand and arm turned blue, and he suffered pain in his shoulder. He was diagnosed with possible thoracic outlet syndrome.

Claimant returned to respondent's employment in 1992, using the various tools above described since that time without incident. Claimant's symptoms did not return until May 1996, at which time claimant advised his supervisor, Paul Kessinger, of the problem. He was referred to the company nurse and then to medical treatment with Dr. John Eplee.

Claimant first obtained medical treatment on May 10, 1996. The history provided by claimant at that time is consistent with the history described by claimant in his testimony. The 1991 Desert Storm incident was described, as well as the aggravations in May 1996. The symptoms in 1996 were substantially more severe than those in 1991, with claimant suffering from numbness, tingling and cramping in his biceps area. He also had tenderness with palpation of the shoulder and, even more significantly, when claimant's arm was abducted to 90 degrees, the radial pulse in the left upper extremity was lost. This abduction of the shoulder, called an Adson's maneuver, and resulting loss of radial pulse, is a medically significant indication of possible thoracic outlet syndrome.

Claimant was ultimately referred to Dr. Steven Joyce, an orthopedic surgeon in Kansas City, Missouri. He underwent shoulder surgery for impingement syndrome, and was released from Dr. Joyce's care in November 1996. Dr. Joyce opined that claimant's condition was work-related. After the release by Dr. Joyce, claimant continued

experiencing bluing and numbness in his arm, and was advised by Dr. Joyce to see a vascular surgeon. Respondent refused to provide care through a vascular surgeon, resulting in the preliminary hearing from which this appeal originates.

After the first preliminary hearing on January 28, 1998, claimant was referred to Dr. Michael McCoy, an orthopedic surgeon, for diagnosis and recommendations for treatment related to the ongoing shoulder problems. Dr. McCoy recommended claimant see Dr. Norman W. Thoms, a board certified vascular surgeon, which claimant did on April 13, 1998. The history provided to Dr. Thoms was consistent. Dr. Thoms opined that claimant developed axillary vein thrombosis in 1991, which persists presently. He also opined that, while the condition started in 1991, the heavy use of the arm in 1996 did aggravate this condition. While Dr. Thoms did state that he could not say whether there was any actual causation of the problem from the activities with respondent, it was his clinical impression that any heavy usage of claimant's left arm with the venous hypertension would be an aggravation of claimant's symptoms, and cause pain, swelling and the discoloration of claimant's upper extremity.

In proceedings under the Workers Compensation Act, it is claimant's burden to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony, along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by the medical evidence presented in this case, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant describes a series of incidents whereby, while using a heavy cutting torch, he developed problems in his left upper extremity and shoulder. The medical evidence supports claimant's contention that the work activities aggravated his condition, even though it was preexisting. It is significant that claimant worked from 1992 to 1996 without symptoms, even though the problem had earlier developed while in the military in 1991. The Appeals Board finds, for preliminary hearing purposes, that claimant has proven accidental injury arising out of and in the course of his employment with respondent on May 7 or 8, 1996, to his left shoulder.

Respondent further contends claimant failed to provide notice, under K.S.A. 44-520, of the accident. The statute requires that notice be given to respondent within 10 days of the accident, stating the time and place and particulars thereof. Respondent, in its brief on page 7, acknowledges that claimant told his supervisor, "Work is affecting what I do. I'm not going to provide very well. It could be possibly due to it, but it might be from '91 when I was injured." After advising his supervisor, Paul Kessinger, of this situation,

claimant was referred to the nurse and on to the series of treating physicians. Respondent's representative, Mr. Blakley, the supervisor of the plant, denied being advised by claimant of this injury. However, he also acknowledged he was not claimant's immediate supervisor. Mr. Kessinger was claimant's supervisor at the time. When asked specifically whether claimant had told Mr. Kessinger of the incident, Mr. Blakley said he could not answer that. Therefore, claimant's testimony that he advised Mr. Kessinger of the accident on the day it occurred is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

With regard to the remainder of the issues raised by respondent, the Appeals Board acknowledges claimant had a preexisting condition, which had been asymptomatic for several years. Also claimant has been involved in physical activities since leaving respondent, and was involved in physical activities, including cutting his own firewood, while working for respondent. However, the record establishes that claimant's job activities with respondent aggravated his shoulder condition. As a result of this aggravation, claimant sought medical care. While there may be other physical causational factors involved, nevertheless, a work-related aggravation of claimant's condition has been proven. Therefore, the Appeals Board finds that the Order by Administrative Law Judge Bryce D. Benedict, granting claimant medical treatment with Dr. Norman W. Thoms, should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated March 19, 1999, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER

c: Michael J. Unrein, Topeka, KS  
John B. Rathmel, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director